

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ALEENA M.,

OAH No. 2011070472

Claimant,

vs.

SAN DIEGO REGIONAL CENTER,

Service Agency.

DECISION

This matter came on regularly for hearing before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, in San Diego California on August 22 and November 30, 2011.

The San Diego Regional Center (agency) was represented by Ronald R. House, Esq.

Claimant was represented by her mother.

Oral and documentary evidence was received and the matter was submitted on November 30, 2011.

ISSUE

Is claimant eligible for agency services?

FACTUAL FINDINGS

1. Claimant is a six-year-old female who has requested agency services. Claimant underwent an agency intake psychological evaluation on May 27, 2011. (Exh. A¹-13) The psychological evaluation was performed by Beatriz E.C. Netter, Ph.D., a licensed clinical psychologist. The resulting report indicates that claimant was referred to Dr. Netter for a psychological evaluation “to assist in the determination of eligibility for services due to a suspicion of mental retardation and/or autism.” (Exh. A-13) Dr. Netter gathered information concerning claimant’s developmental and medical history² from claimant’s mother, a December 2010 developmental evaluation conducted at Rady’s Children’s Hospital, a March 2011 special education evaluation conducted by the Coronado School District, and descriptions of claimant by previous evaluators. Additionally, Dr. Netter administered the Vineland Adaptive Behavior Scales, Second Edition, the Wechsler Preschool and Primary Scale of Intelligence-III (WPPSI-III), the Autism Diagnostic Observation Schedule (ADOS), and observed claimant during play and during her interactions with Dr. Netter. On the intelligence assessment claimant “obtained a Full scale IQ score of 80.” (Exh. A-13) In the Diagnostic Impression and Discussion section of her report, Dr. Netter described claimant’s condition as follows:

“[Claimant] does not meet criteria for mental retardation nor for a pervasive developmental disorder. She does, however, demonstrate significant difficulties that appear to be both neurologically and emotionally based. Her overall cognitive abilities are in the borderline to low average range with some difficulty expressing herself verbally and some visual-perceptual difficulties which are likely to have a significant impact on her learning. She demonstrates deficits in adaptive functioning. Although [claimant] reportedly has a marked impairment in social interactions with peers it is not of the quality associated with a pervasive developmental disorder and are most likely related to difficulty modulating emotions and attachment-related difficulties associated with the early neglect and abandonment.

Although beyond the scope of this evaluation, given her explosive outbursts with reported lack of awareness, it would be important to rule out a seizure disorder and/or a disorder in the Bipolar spectrum.” (Exh. A-13)

¹ “A” refers to the agency’s exhibits.

² Claimant was abandoned by her biological parents at the age of 13 months. Although the information about claimant’s birth and first year of life is extremely limited, it appears that claimant’s birth-mother used methamphetamines, alcohol and tobacco during pregnancy. Claimant was diagnosed with craniosynostosis, a birth defect where the joints of her skull closed prematurely, resulting a “cone-shaped” head. Consequently, claimant underwent cranial reconstruction when she was 19 months old. Claimant’s current mother “took claimant in” and became her legal guardian.

2. On June 9, 2011, as a result of evaluating all of the relevant information concerning claimant, the agency notified claimant's mother that claimant was not eligible for agency services because she did not have a developmental disability. Claimant's mother timely appealed the agency's denial of services and the instant hearing ensued.

3. The first day of hearing, August 22, 2011, was focused primarily on the issue of whether claimant qualified for services based on having a condition similar to mental retardation that requires treatment similar to that required by an individual with mental retardation (5th category). Claimant's mother's testimony during the first day of hearing along with the contents of an August 5, 2011, neurological consultation at Rady Children's Hospital located in San Diego (Children's)³ gave rise to a concern that claimant may have a history of undiagnosed epilepsy or seizure disorder. Consequently, the parties agreed to continue the hearing so that claimant could undergo neurological testing.

4. On August 26, 2011, claimant was again seen by Dr. Bui at Children's. Dr. Bui noted the following relevant information which was obtained from claimant's mother:

"This is a 6 year old girl with craniosynostosis repair in infancy and methamphetamine exposure prenatally whom I first evaluated for staring episodes where her mother reports that she loses muscle tone and starts crying. I intended to do a sleep deprived EEG. Since her initial visit, she has had a seizure where she had a generalized tonic clonic which lasted some 1-2 minutes. She was in the car at the time and was said to be groggy post event. The next day, she had a similar generalized tonic clonic seizure; her mom held on to her arm but she still kept shaking. This lasted a few minutes and she was very groggy. She was taken to the ER where she had bloods, and head CT which were normal. She was admitted and had an MRI and EEG done which were normal." (Exh. C⁴-13)

Based on his review of claimant's history, Dr. Bui arrived at the following impression:

"This child with intellectual disability whom I first saw for paroxysmal episodes worrisome for seizures has now had two generalized tonic clonic seizures. This is consistent with epilepsy. I will start her on levetiracetam for seizure prophylaxis. While studies at the time of seizure were reportedly

³ The Neurology consultation at Children's was done by Dr. Jonathan Bui, Ph.D., M.D. The consultation notes reveal that claimant was referred to Dr. Bui for evaluation by another physician, Dr. Petrovich due to "paroxysmal staring." Dr. Bui noted that "[claimant] has paroxysmal events of unclear etiology but do worry me for seizures." (Exh. C-13)

⁴ "C" refers to claimant's exhibits.

normal, I would like to have the images for review as well as order follow-up sleep deprivation EEG since the signatures of seizures tend to be more evident weeks after the event. Her seizures and developmental delay are related events and she ought to get services to ensure her continued development. I spent 45 minutes with this child and mother; the majority of this time was in counseling.” (Exh. C-13)

5. Dr. Laura Norton Petrovich, M.D., claimant’s pediatrician, wrote a letter on claimant’s behalf. In her September 23, 2011, letter, Dr. Petrovich (the doctor who referred claimant to Dr. Bui to be evaluated on August 5, 2011, prior to the first day of the instant proceedings) stated:

“I [am] writing today on behalf of my patient, [claimant]. I am making a formal recommendation and referral for services through the Regional Center. I believe that [claimant] would benefit from services provided through the center due to her substantial disability related to her seizures and developmental delays.” (Exh. C-14)

Dr. Petrovich also wrote an October 3, 2011, letter to the school district in which she stated:

“This is to inform you that my patient [claimant] was seen in clinic today and is followed closely for her seizure disorder as well as other developmental issues. It is in my professional opinion that she should have special precautions to prevent seizures including teaching aides that are proficient with procedures regarding seizures, a place to rest post seizure or should she become drowsy. She should also not be subjected to any flickering lights. If she does become over heated from PE she should be allowed to cool down and provided with water for hydration.” (Exh. C-15)

6. An October 18, 2011, Individualized Education Program (IEP) Notice of Proposed Action, stated, in pertinent part: “[Claimant] currently has a new diagnosis of Epilepsy. Her pediatrician and neurologist believe that this is directly related to her educational difficulties and developmental delays.” (Exh. C-17)

7. Dr. Joan Resse, who is board certified in neurodevelopmental disabilities, who works as a medical consultant for the agency, reviewed all of the reports concerning claimant and the following is her paraphrased testimony: Dr. Bui diagnosed claimant as having epilepsy based on reports of her having suffered two seizures; no tests exist that are specific to seizures; Epilepsy is only a qualifying condition if it results in “substantial disability;” based on current medical records and other information claimant does not appear to have a substantial disability due to epilepsy, claimant is now on anti-seizure medications and has fairly recently had the

dosage increased; there is no information concerning claimant's response to treatment, or any follow-up neurology report; claimant has speech and language deficiencies and behavioral issues that are not a direct result of epilepsy; claimant has complex medical and social issues and it is "difficult to tease out cognitive factors."

Summary of Relevant Facts

8. Claimant does not have a disability that is attributable to mental retardation, cerebral palsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation. Claimant does have a history of seizures, as reported by her mother who was a very credible witness; however, there has not yet been a definitive "diagnosis" of epilepsy or seizure disorder." There are references to a "diagnosis" of epilepsy in some of the medical records; however, these references appear to have evolved from Dr. Bui's August 26, 2011, reference in his report to his "impression" that claimant's reported seizures were "consistent with epilepsy." A clinical "impression," based on third party reports, is not equivalent to a "diagnosis." Further support for this finding comes from Dr. Bui's August 26, 2011, report. In the report, Dr. Bui noted that he was starting claimant on levetiracetam for seizure prophylaxis (i.e. as a precautionary measure). Dr. Bui then recommended that a follow-up sleep deprivation EEG be performed "since the signatures of seizures tend to be more evident weeks after the event." It appears that more medical evidence must be gathered before a definitive diagnosis of "epilepsy" and/or "seizure disorder" can be made.

LEGAL CONCLUSIONS

1. California Welfare and Institutions Code section 4512 defines a "Developmental Disability" as a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely. . ." California Code of Regulations, title 17, section 54000 further defines "Developmental Disability" as follows:

"(a) 'Developmental Disability' means a disability that is attributable to mental retardation, cerebral palsy, epilepsy, autism, or disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation.

(b) The Developmental Disability shall:

(1) Originate before age eighteen;

(2) Be likely to continue indefinitely;

(3) Constitute a substantial disability for the individual as defined in the article.

(c) Developmental Disability shall not include handicapping conditions that are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.”

2. California Code of Regulations, title 17, section 54001 provides:

“(a) ‘Substantial disability’ means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parents, guardians/conservators, educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

(d) Any reassessment of substantial disability for purposes of continuing eligibility shall utilize the same criteria under which the individual was originally made eligible.”

3. The facts, considered as a whole, reveal that at this time, claimant does not have a “diagnosis” of a qualifying “Developmental Disability;” therefore, she is not eligible for agency services. Additionally, if it is determined that claimant has epilepsy and or seizure disorder, then, pursuant to California Code of Regulations, title 17, section 54001, subdivision (b), there needs to be an expert opinion/determination as to whether claimant’s epilepsy gives rise to a substantial disability. The determination “. . . shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.”

4. Claimant’s mother has taken the initiative to obtain assessments from Children’s and has provided letters from claimant’s pediatrician. The reports and letters give rise to a concern that claimant has, since birth, been having undiagnosed seizures. California Code of Regulations, title 17, section 54001 provides that the agency shall make the qualifying determination; therefore, with claimant’s mother’s permission, the agency shall provide or fund appropriate testing to determine, with a reasonable degree of medical certainty, whether claimant has epilepsy (a “developmental disability”) and, if so, the degree to which the epilepsy creates or significantly contributes to claimant’s disabilities (does it give rise to a “substantial disability?”).

ORDER

Wherefore, the following Order is hereby made:

1. The agency's conclusion that claimant is not eligible for agency services, at this time, is upheld;
2. The agency shall provide or fund appropriate testing to determine, with a reasonable degree of medical certainty, whether claimant has epilepsy (a "developmental disability") and, if so, the degree to which the epilepsy creates or significantly contributes to claimant's disabilities (does it give rise to a "substantial disability?"); and,
3. If claimant's mother disagrees with the agency's determination(s) this decision and order are issued without prejudice to her right to request a fair hearing on the issue(s).

DATED: December 14, 2011.

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings

Note: This is a final administrative decision pursuant to Welfare and Institutions Code section 4712.5(b)(2). Both parties are bound hereby. Either party may appeal this decision to a court of competent jurisdiction within 90 days.